

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-6078

77-6081, 77-6083

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RAY MARSHALL, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR, PLAINTIFF-APPELLEE

v.

GEORGE SNYDER, IRVING ROSENZWEIG,
ANTHONY CALAGNA, CLARENCE CLARKE,
JAMES ISOLA, WILLIAM SNYDER,
JOSEPH GRIPPO, BENJAMIN PETCOVE,
GENERAL TEAMSTER INDUSTRIAL
EMPLOYEES LOCAL 806, 806 RECORD
PROCESSORS, INC., DEFENDANTS-APPELLANTS

Appeal from the United States District Court
for the Eastern District of New York

BRIEF FOR THE SECRETARY
OF LABOR

CARIN ANN CLAUSS,
Solicitor of Labor,
STEVEN J. SACHER,
Associate Solicitor,
MONICA GALLAGHER,
Counsel for Litigation,
MARY S. CALFEE
SHERWIN KAPLAN
Attorneys

Plan Benefits Security Division
Office of the Solicitor
U.S. Department of Labor
Washington, D.C. 20210

FRANCIS V. LaRUFFA,
Regional Solicitor

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ISSUE PRESENTED FOR REVIEW

Whether the district court properly found that defendant-appellants were diverting the assets of three employee benefit plans for the benefit of the defendant union and its officials in violation of a consent order and properly exercised its discretion in appointing a receiver pendente lite to operate those plans and a corporation wholly owned by one of the plans.

STATEMENT OF THE CASE

Nature of the Case

This is an interlocutory appeal from the Memorandum and Order of April 28, 1977, and the Order of May 10, 1977, of the Honorable George C. Pratt of the U.S. District Court for the Eastern District of New York. The underlying action was brought by the Secretary of Labor to enforce the fiduciary provisions of the Employee Retirement Income Security Act of 1974 (ERISA). The Orders appealed from, among other things, appointed a receiver for the pendency of the action to assume the duties of the trustees of three employee benefit plans and of the directors of a corporation wholly owned by the trustees of one of those plans.

Statutory Framework

The Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 et seq., is a comprehensive remedial statute enacted to protect "the interests of participants in employee benefit plans and their beneficiaries ... by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to Federal Courts." 29 U.S.C. 1001(2)(b).

A central and fundamental obligation imposed on fiduciaries by ERISA is that they must discharge their duties solely in the interest of the participants and beneficiaries and--

- (A) for the exclusive purpose of
 - (i) providing benefits to participants and their beneficiaries; and
 - (ii) defraying reasonable expenses of administering the plan;
- (B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

ERISA §404(a)(1)(A)-(B), 29 U.S.C.
§1104(a)(1)(A)-(B)

The above provisions embody a carefully tailored, federalized common law of trusts, including the familiar requirement of undivided loyalty to the beneficiaries and the prudent man rule. The provisions of ERISA §406, 29 U.S.C. §1106, supplement these fundamental standards by expressly prohibiting certain categories of transactions between plans and their

affiliated "parties in interest."^{1/} ERISA §502, 29 U.S.C. §1132, confers federal court jurisdiction and permits the Secretary of Labor and private parties to bring civil actions for appropriate equitable relief.

Course of Proceedings and Disposition Below

The complaint in this action was filed on January 20, 1977, by the Secretary of Labor under Title I of the Employee Retirement Income Security Act of 1974 (ERISA). It named as defendants present and former trustees of three collectively bargained, Taft-Hartley^{2/} employee benefit plans--the 806 Teamsters Health and Welfare Fund, the 806 Teamsters Pension and Retirement Fund and the 806 Teamsters Annuity Fund, (hereinafter "the plans") and also named as defendants the local union, General Teamsters Industrial Employees Local 806 (hereinafter "the union") and 806 Record Processors, Inc., (hereinafter "RPI") a corporation which is wholly owned by the trustees of the Welfare Fund.

The complaint alleges that the defendant-trustees violated sections 404 and 406 of ERISA by their actions, including participation in 1) "salary payments" to defendant George Snyder

1/ Parties in interest are defined in ERISA §3(14), 29 U.S.C. 1002(14). The application of §406 and 3(14) to the facts here is discussed at part II of the argument.

2/ Employer payments to trustees of an employee benefit plan meeting the substantive and structural requirements of §302(c)(5), 29 U.S.C. 186(c)(5), of the Labor-Management Relations Act, 1947, are not subject to the criminal prohibitions of section 302(a) of that act. Plans designed to meet these requirements are commonly referred to as "Taft-Hartley" plans.

from plan assets in excess of one million dollars since January 1, 1975; 2) payments of almost \$400,000 from assets of the pension plan for decorating and refurnishing the common offices of the plans, the union, and RPI; and, 3) the "purchase," for some \$300,000 by the welfare plan of all of the "stock" of the newly organized RPI, which then "loaned" substantially the same amount to the union (App. 4).^{3/} As ultimate relief, plaintiff seeks removal of the trustees, restitution to the plans of unlawful expenditures, and other equitable relief (App. 7-8).

Because of the apparent probability that substantial assets of the plans would be further depleted during the pendency of the action, the Secretary moved for a preliminary injunction to terminate payments to George Snyder and to the defendant union and to appoint a receiver to operate the plans in accordance with law until final resolution of the case.

That motion was disposed of by a consent order^{4/} entered February 4, 1977. The consent order prohibited further dissipation

3/ "App." references are to the Joint Appendix.

4/ The Order provided, among other things:

1) that defendant trustees of the Local 806 Welfare Fund, Pension Fund, and Annuity Fund shall not make or permit to be made any direct or indirect payments for any purpose from the assets of the respective Funds of which they are trustees to defendant George Snyder, to any of the other individual defendants, to defendant Local 806, or for the benefit of any of said defendants;

2) that defendant 806 Record Processors, Inc. shall not hereafter make or permit to be made any

of plan assets by prohibiting the trustees and RPI from making or permitting to be made any direct or indirect payments, for any purpose, to George Snyder, the other individual defendants, or to the defendant union. The only exception to this absolute prohibition against further payments to or for the benefit of defendants was that RPI was permitted to continue to make, and the affected persons to receive, salary payments to four named employees "for services actually rendered." As RPI's only source of income and only clients are the plans, services actually rendered to RPI are necessarily services for the benefit of the plans.

Subsequent to the entry of the Consent Order, the Secretary undertook discovery. Evidence indicating that the defendants were not complying with the Order (App. 15-16, App. 19-22), led to the application for (App. 13-18) and entry of the Order to Show Cause (App. 28). On April 21, 1977, the matter came before the court for an evidentiary hearing. Specifically, the Secretary claimed that the consent order of February 4, 1977, was being

4/ (footnote con't.)
direct or indirect payments for any purpose from its assets to defendant George Snyder, to any of the other individual defendants, to defendant Local 806, or for the benefit of any of said defendants; with the only exception that 806 Record Processors, Inc. may continue to make salary payments for services actually rendered to defendants Clarence Clarke, Anthony Calagna, James Isola, and William Snyder in amounts not exceeding the following:

	<u>Maximum per week</u>
Anthony Calagna	\$750
Clarence Clarke	\$300
James Isola	\$825
William Snyder	\$600

violated and that the dissipation of plan assets was continuing because the plans through RPI were making substantial payments to the four individually named defendants and to other persons either for no work or for work for the union, but not for work for the plans or RPI. As relief the Secretary of Labor sought appointment of a receiver to take control of the plans and of RPI for the pendency of the action, an injunction forbidding any future payments from plan assets to the four defendants, and an Order holding the defendants in contempt of the consent order. In response, the defendants urged that the expenditures in question were for the benefit of and necessary to the plans, and that even if a portion of the work done was for the benefit of the union, that arrangement was contemplated by the consent order which was designed to preserve the status quo.

At an eight-hour evidentiary hearing the Court took the testimony of nine witnesses and admitted 25 exhibits. On April 28, 1977, the Court issued a Memorandum and Order in which it made some fifty findings of fact pertinent to the issues before it and made extensive conclusions of law in which it found that the conduct of the defendants "clearly violated both the consent order and the prohibitions of ERISA" (App. 317) by extensive and illegal subsidization of the union and its officials from plan assets.^{5/} The Court determined that "immediate and drastic action" was required "to preserve from

^{5/} The Court also found that in two instances payments had not been within the terms permitted by the consent order (App. 310).

further dissipation the assets of the Plans for the benefit of their participants and beneficiaries" (App. 313-4) and that "the best interests of the Plans' participants and beneficiaries require immediate appointment of a receiver for all three plans and RPI pending final determination on the merits" (App. 311).

The Court also, in the Order of April 28, enjoined further payments to the four defendants in question for the pendency of the action (App. 318), and reserved decision on the issue of contempt, admonishing the defendants that their cooperation with the receiver might bear on that question (App. 317). The receiver was installed and began to function "with all powers over the assets, liabilities, and management of the three plans and RPI which a receiver customarily may exercise under the jurisdiction of a United States District Court" (App. 318). On May 10, 1977, the Court issued an additional Order which set forth the powers and duties of the receiver and amplified the April 28 Order (App. 321).

Statement of Facts

The facts directly pertinent to the issues presented by this appeal are those relating to defendants' compliance vel non with the consent order of February 4, 1977. That order prohibited the trustees and RPI from making or permitting to be made any direct or indirect payments for any purpose to the individual defendants or to the union with the only exception that four individual defendants could receive

salary payments for "services actually rendered" to RPI. Thus evidentiary examination of the operations and personnel of RPI, the union and the plans is appropriate.

The record discloses that the union local has about 2160 members in some 120 covered "shops," each of which has a collective bargaining agreement with the union (App. 298 (Court), 123-24). The union's annual income from dues is approximately \$350,000 (App. 303 (Court), 82).

The welfare, pension, and annuity plans are trust funds created and funded under collective bargaining agreements between the union and employers of employees covered by those agreements to provide health, pension, and unemployment benefits to plan participants and their beneficiaries (App. 298-99). Under the terms of the collective bargaining agreements, the welfare plan receives about one million dollars annually in employer contributions (App. 303 (Court), 77); the pension plan receives about \$300,000 annually (App. 303-304 (Court), 77); and the annuity plan receives about \$75,000 annually (App. 303 (Court), 82). Most of the union members are participants in the welfare plan and the members of their families are beneficiaries of that plan and about one-half are participants in the pension fund (App. 298 (Court), 124-25).

RPI is a corporation whose outstanding stock is wholly owned by the trustees of the welfare plan and which performs all the administrative functions of the plans (App. 299 (Court), 67). RPI receives as its only income amounts totalling about

\$300,000 annually from the welfare plan and about \$36,000 annually from the pension plan (App. 304 (Court), 66). The union, the plans, and RPI share common offices at Melville, New York (App. 301 (Court), 65, 86; Def. Exh. B, Court Exh. 1). The three entities also have had common officials and personnel -- some of the present or former trustees of the plans are members of the Union's executive board; some are officers, directors, or employees of RPI; and some are both (App. 299-300 (Court), 71, 72, 145, 146, 147, 237, 253).

A comparison of the payrolls of the union with that of the plans (through RPI) almost suffices by itself to establish subsidization prohibited by the February 4 Order. The evidence discloses that R.P.I. employed eleven persons, ostensibly to do the administrative work needed for the plans (App. 69-71, 290). However, only four of these employees^{6/} -- none of them defendants -- were involved in any in-office processing of health or pension claims or any other in-office work of any significance (App. 305 (Court), 69, 127-129, 267-268). One of these four processed all the claims for health benefits with substantially no supervision (App. 94-102, 118).^{7/} Six of the remaining seven RPI employees had the job title of "field

6/ A fifth employee had also been so involved but had terminated during the relevant time period (App. 69-70).

7/ The benefit claims processed and paid out by the plans through RPI are rather modest in number. There are between two and three hundred health claims processed each month (App. 126) for the welfare plan and approximately fourteen pension claims had been processed for the pension plan in the last year (App. 126-127).

representatives"^{8/} (App. 300 (Court), 70). At the same time, the union had only one full-time employee, Mrs. Mavroson, who served as an office manager of the shared offices of all the entities^{9/} (App. 303 (Court), 75, 81).

The actual activities of the persons on the RPI payroll explain these incongruities in numbers of personnel to do the work of the plans and the union -- in plain terms, the plans through RPI were providing extensive free services to the union. The four individuals exempted by the consent order - three of whom held union office -- were being paid substantial sums as "field representatives" by RPI for activity which was substantially union work and not plan work (App. 299, 305-6 (Court)) as even their own testimony clearly demonstrates (e.g., App. 193, 196, 205, 241, 266, 290-291).^{10/} The two other RPI "field representatives" (Gonzalez and Kremens) did similar union work (App. 300 (Court), 212, 260-61, 262-65, 292); clerical personnel employed by RPI were

^{8/} Four of these six were the defendants Calagna, Isola, Clarke, and William Snyder exempted from the prohibition on payments in the consent order contingent on their salaries being paid in return for "services actually rendered" to RPI. The other two were Gonzalez and Kremens [sic Cremmins] who terminated his employment sometime after entry of the consent order (App. 70).

^{9/} The only other persons on the union payroll were a retired union employee who, it was represented, was receiving back pay for past services, and two union trustees each of whom received \$1800 annually (App. 303 (Court), 75-76).

^{10/} The tenor of much of this testimony was that the field representatives spent significant amounts of time negotiating benefit structures, rates, etc. That is, of course, union rather than plan work.

also engaged in some union work (App. 303 (Court), 73, 120-21); and, finally, one paid employee of RPI served as a chauffeur for George Snyder, a union officer who was not even an employee of RPI (App. 301 (Court), 69-70, 245, 250, 292).

It was the six plan "field representatives" who, in effect, did all the organizing, negotiating, grievance processing and other regular work of the union (App. 299, 305-7 (Court), 133-37, 139, 142-43, 151-53, 190-93, 196-99, 204-06, 208, 227, 233-34, 241-42, 254-55, 266). While the field representatives also performed some services for the plan, including assisting with delinquent contributions, acting as liaison, and answering questions by participants about benefits, not only the circumstantial evidence described above but also the direct evidence shows that these services were quite limited (App. 305-6 (Court), 111, 113-14, 116, 127-29, 162, 189, 229-30, 235).

In addition to providing these extensive free services to the union and its officers, the plans through RPI were further subsidizing the union by paying a disproportionate share of the rent for the common offices. Prior to the time the suit had been filed, RPI had paid the entire rent, and even after the time the consent order was entered, the plans through RPI paid 83 percent of the rent, the percentage being based on a space allocation which substantially underestimated the union use of the rented space (App. 301-2 (Court), 85-88, 131-32, 154-61, Def. Exh. B, Court Exh. 1).

ARGUMENT

I. THE EVIDENCE IN THE RECORD AMPLY SUPPORTS THE TRIAL COURT'S FINDINGS AND CONCLUSIONS.

Appellants' attempt to demonstrate that the trial court's findings were clearly erroneous is a transparent failure, for the overwhelming weight of the evidence supports those findings. Their attempts rely largely on the conclusory and self-serving testimony of the defendants which runs counter to the substantial evidence that they had engaged in or allowed numerous violations of the consent order, in a pattern of activity summed up as follows by the Court in its Memorandum:

RPI's payments of salaries to field representatives who perform substantial services for the Union, to clerical employees who perform at least some services for the Union, and to DeVuone who serves as George Snyder's personal chauffeur, all reflect a continuing pattern of monies to or for the benefit of the Union (App.315).

Appellants argue first that this pattern of diversion is permitted by the consent order, or, on the other hand, they argue that the record establishes that no such diversion occurred.

The construction of the consent order advanced by appellants (allowing subsidy of the union by RPI) requires an extremely strained interpretation of its language and relies on their unilateral assertions respecting the intentions underlying it. ^{11/}

^{11/} While we believe the understandings of the parties at the time of the entry of the order are irrelevant as a matter of law, we would deny appellants' assertions that any such understandings accompanied that disposition.

The language of the order itself is the proper basis by which it ought to be construed. (In any event, the record is silent on other evidence of the parties' or the court's intent.) That language quite clearly prohibited the plans trustees and RPI from making or permitting to be made any direct or indirect payments for any purpose to the individual defendants or the defendant union or for the benefit of any of said defendants with the only exception that four individual defendants could continue to receive salary payments up to certain specified amounts from RPI for services actually rendered. The only logical reading of the provision permitting certain salary payments from RPI "for services actually rendered" would require that such services be rendered to or for the benefit of RPI; and since it is undisputed that RPI's only source of income and only clients are the plans, services to RPI are necessarily services to the plans. Despite these facts and notwithstanding that the consent order elsewhere expressly prohibits any payments from RPI for the benefit of the union,^{12/} defendants would seek a construction to allow payments to the four individual from RPI for "services actually rendered" to be read to permit

^{12/} We note that defendants do not raise objections to the Court's construction of the consent order under which it found violations of the provisions which prohibited RPI from making "any direct or indirect payments for any purposes from its assets either to or for the benefit of the union" upon its finding that RPI was making salary payments to two nondefendant "field representatives" (Gonzales and Kremens) who were performing substantial services to the union (App. 300, 305).

those services to be rendered not to RPI or its clients but instead to the union. Such a construction is an unreasonable reading of the language and produces an absurd result.

Appellants' argument that the evidence fails to establish the diversion of plan assets found by the court bears no analysis. It proceeds largely if not entirely from the proposition that certain of the defendants testified that they served the plans. In the brief submitted on behalf of defendants Calagna, Clarke, Grippo, Isola, Petcove and W. Snyder ("Calagna Brief") there are extensive quotations of the self-serving testimony of the defendants at the April 21, hearing, with argument suggesting that the trial court should have accepted these statements unquestioningly. Of course the trial court was in the best position to assess the credibility of this testimony, having the opportunity to observe the presentation and demeanor of the witnesses. But even without demeanor evidence, some of this testimony is unbelievable on its face. For example, James Isola, paid by RPI since its inception in 1975, testified on direct examination that his "seven-day week 24 hour operation" (App. 227) was primarily for the plans and RPI. On cross-examination, however, he admitted that prior to being employed by RPI he had been an employee of, and paid by, the union, and that there had been no significant change in his duties when he changed employers (App. 228).

While the Calagna brief paints a picture of field representatives working day and night to help plan participants, the

evidence provides few details, and those offered sometimes stretch credulity. Assistance in filling out claim forms is mentioned; however, as already noted, only two to three hundred health forms in toto and about one pension claim are processed each month (App. 126-27). The forms themselves, offered in evidence as Plaintiff's exhibits 2, 3, and 16, are not complicated, and when they are not correctly completed, the claims processor Mrs. Craig generally mails them back to the participant (App. 109).

Further examination of the details of the duties assertedly performed for the plans by the field representatives reveals that defendant William Snyder, as quoted on p. 19 of the Calagna Brief, testified that one of his responsibilities was keeping after members who have recurring changes of name (sic). Defendant Isola is quoted, on p. 24 of the Calagna Brief, on the time-consuming problems of dealing with the 40 percent of the union membership which is Spanish speaking and who lack understanding of their welfare benefits; but non-defendant Gonzales is the Spanish language liaison, as appears both from his testimony ("Yes, I do all of the translation for the local ..." (App. 263-64)) and from that of Isola himself, who asked by his own attorney, "Is there a Spanish speaking representative?" (App. 225), replied, "Yes, there is Mr. Gonzalez who I might say I call upon frequently with his help and these problems" (App. 225). On this same point, defendant Calagna stated, "Anywhere I have a Spanish speaking person I need Mr. Gonzalez because I don't understand any Spanish or speak Spanish" (App. 239).

The Calagna Brief also focuses on the liaison function of the "field representatives," but specific testimony demonstrates that that task could not consume much of their energies. For example, Mrs. Craig, the office employee who precesses all the health claims, was asked by the attorney for some defendants whether one of the duties of the field representatives was bringing marriage and birth certificates to her from the shops and she replied that it was (App. 113). On re-direct, however, she testified that during the period the consent order was in effect she received no birth certificates from field representatives and only one or two marriage certificates (App. 116). When asked how often in the preceding month she had sought field representatives' assistance in claims problems, she replied, "about seven times" (thus averaging about one request per field representative per month) (App. 111-12).

The trial record is replete with additional inconsistencies, mis-statements, misleading statements and exaggerations, which serve to discredit the testimony offered on behalf of the defendants.

Appellants do not deal with the evidence that the union president (Calagna), vice-president (Isola), secretary-treasure (G. Snyder), recording secretary (W. Snyder) or executive committee member (Gonzalez) are paid no salary or expenses whatsoever by the union, but are paid (except George Snyder) by RPI, whose only paying clients are the plans. They do not deal with the evidence that the only individuals on the union payroll are an office manager, and trustees (not

parties here) who receive payments of \$125 each a month, and a retired individual who is still receiving back pay from the union but who performs no work. They do not explain why the shops "serviced" by the RPI field representatives "for the plans" (as they claim) require none of the much more usual servicing by union representatives.^{13/}

They do in the Calagna Brief address the allocation of office space costs, under which the union paid first no rent, and then after this action was filed, was assessed 17 percent of the total rental cost although all the union officers, and no one else, have private offices there. They argue the bona fides of that allocation and contend that it was proper to assess RPI for the rental costs of the offices of Calagna, Isola, and William Snyder (all of whom are union officers as well as RPI "field representatives") by arguing that the Court was wrong in its finding that the three don't perform "appreciable in-house duties for RPI" (Calagna Brief at 32). Yet elsewhere in their brief they state that the field representatives' services for RPI were performed in large part outside the office during visits to the shops (Calagna Brief at 10).

^{13/} Appellants seek to minimize the extensive testimony of the "field representatives" respecting their activities in organizing shops, negotiating contracts, and conducting other union business, and to the extent that they acknowledge that testimony, they seek to argue that plan assets can properly be expended for those activities because collective bargaining includes bargaining about contributions to the plans and benefit coverage. As the Court correctly found (App. 311), organizing and negotiating contracts are union functions and not proper functions of the plans. See discussion at 25-26 infra.

Against the Court's detailed findings defendants offer in substance only the self-serving, contradictory, and conclusory statements of the four employee defendants and Gonzalez who unsuccessfully attempted to convince the trial court that the majority of their time was spent providing service to the plans.

The clear picture which emerges from the record as a whole is, as the court found, that plan assets, funneled through RPI, were used to support the union and its activities. This support included payment of union officers and officials for union activity, provision of office space and provision of clerical assistance. Before Feb. 4, 1977, such activities violated the fiduciary provisions of ERISA; after that date, they also violated the consent order.

II. THE COURT'S LEGAL CONCLUSIONS WITH RESPECT TO ERISA ARE CORRECT.

While the findings of extensive violations of the consent order alone justified the interim relief, the Court also rested its decision on violations of ERISA.

As the Court below correctly perceived, fundamental obligations imposed by ERISA on plan fiduciaries are set forth in part IV of title I of the statute. The provisions of part IV, including sections 404 and 406, 29 U.S.C. 1104 and 1106, represent a comprehensive scheme to protect the assets of employee benefit plans from the very kind of abuses found here.

^{14/} Defendants-Appellants George Snyder and Irving Rosenzweig argue that because RPI provided necessary services to the plans, they as welfare plan trustees need not otherwise concern themselves

After setting fourth in great detail both the extensive misuse of plan assets in the "matters which are subject of this motion," [asserted violations of the consent order] the Court correctly found they "all reflect a continuing pattern of diversion of monies to or for the benefit of the Union, and therefore, not solely in the interests of the participants and beneficiaries 29 U.S.C. 1104(a)(1)." (App. 315).

The Court also correctly found that this "pattern of manipulation and diversion" constituted violations of other provisions of part IV of title I. The provisions of ERISA section 406 prohibit altogether certain categories of transactions between plans and their affiliated parties in interest as defined by ERISA §3(14), 29 U.S.C. 1002(14).^{15/} These provisions are rooted in a Congressional recognition of the past misuse of the assets of employee benefit plans by affiliates or "insiders" with respect to those plans who sought to benefit themselves or the employee organization or companies with which

^{14/} (footnote cont.)

with the plan assets expended by RPI, the welfare plan's wholly owned subsidiary. However, pursuant to the provisions of ERISA section 404 and 406 these fiduciaries were charged with insuring that the plan assets were expended only for proper purposes (and not, for example, to provide chauffeur services to one of them), and with preventing plan assets from being used for transactions prohibited by ERISA.

^{15/} Parties in interest to the plan include contributing employers (§3(14)(C)), the union (§3(14)(D)) and its officers (§3(14)(H)), service providers (§3(14)(B)) and plan fiduciaries (§3(14)(A)).

they were associated at the expense of the plans participants, and beneficiaries. Section 408, 29 U.S.C. 1108, permits certain exemptions from the prohibitions of section 406. The relevant exemptions provisions contain standards designed to safeguard plan assets.^{16/}

Defendants, in effect, concede that the arrangements under which the six "field representatives" and DeVuone were employed by RPI, were, as the Court found, prohibited transactions in the form of direct or indirect "furnishing of goods and services between the plan and a party in interest," 29 U.S.C. 1106

(a)(1)(C).^{17/} However, appellants seek to argue that the arrangement fell within the exemption set forth in section 408(b)(2), 29 U.S.C. 1108(b)(2) which provides an exception for

contracting or making reasonable arrangements with a party in interest for office space, or legal, accounting or other services necessary for the establishment or operation of the plan if no more than reasonable compensation is paid therefor. (Emphasis added)

The facts found by the Court establish that appellants' arrangements do not qualify for this statutory exemption. As the Court found, and as the entire record establishes, the plans by these transactions through RPI were paying

^{16/} The burden is, of course, on the party seeking or relying on the exemption to establish that it meets the appropriate requirements.

^{17/} Pursuant to the provisions of 29 U.S.C. 1002(14), the Court correctly found, among other things, that the union was a party in interest, 9 U.S.C. §1002(14)(D); and that the officers of the union including Calagna, Isola, William Snyder (all of whom are also RPI "field representatives") and George Snyder are also parties in interest, in their capacity as union officers, pursuant to 29 U.S.C. 1002(14)(H) and regardless whether they are service providers under 29 U.S.C. 1002(14)(B).

substantial salaries to provide free work for the union,^{18/} which work by definition was not necessary to the operation of the plans. Since as a result the plans were not getting much service in return for the money spent, the compensation was ipso facto not reasonable.

Appellants also point to the provisions of ERISA section 408(c)(3), arguing that those provisions are somehow inconsistent with the basis for the remedy the Court selected to stop the pattern of manipulation and diversion it found. Specifically, defendants argue that the Court was "confused" about the proper relationship between a union and a related Taft-Hartley employee benefit plan and show that under section 408(c)(3), 29 U.S.C. 1108(c)(3), section 406 is not to be construed to prohibit a fiduciary from "service as a fiduciary in addition to being an officer, employee, agent or other representative of a party in interest."

This provision is an express Congressional recognition of the fact that many of the plans now covered by ERISA -- plans designed like those here -- are plans created pursuant to collective bargaining in which historically the union and management (as settlors) select persons who are officials

^{18/} These transactions could also be viewed as transactions prohibited by ERISA section 406(a)(1)(D) in that the provision of free services to the union can be viewed as a transaction constituting a direct or indirect "transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan." 29 U.S.C. 1106 (a)(1)(D).

of their respective associations to serve as plan trustees. ^{19/}

However, while ERISA permits a union officer to serve as a trustee of an employee benefit plan, it does not relieve him of the duties imposed on fiduciaries pursuant to ERISA section 404, 29 U.S.C. 1104, nor does it otherwise relieve him from the other prohibitions of ERISA §406, 29 U.S.C. 1106. In his proper role as plan fiduciary, a trustee must therefore act solely in the interest of the participants and beneficiaries and insure that the assets of the plans are used not for the union's or any others' benefit, but solely as the law requires for the exclusive purpose of:

- (i) providing benefits to participants and their beneficiaries; and
- (ii) defraying reasonable expenses of administering the plan. 29 U.S.C. 1104(a)

The plan trustee who also serves in a different capacity as union officer must not allow that separate capacity to dilute or subvert his trustee duties to the participants and beneficiaries, notwithstanding the potential for conflict of interest or self-dealing in the two roles.

^{19/} Employer payments to a union sponsored plan are not prohibited when it is jointly administered and otherwise complies with the requirements of section 302(c) of the Taft Hartley Act, 29 U.S.C. 186(c). As is made clear by the legislative history of section 302, its prohibition was designed to prevent union control of pension and welfare plans to which employers had agreed to contribute in collective bargaining. SUPPLEMENTAL VIEWS ON S. 1126, S. Rep. No. 105, 80th Cong., 1st Sess. 52 (1947).

The section 406 transactions prohibited between plans and parties in interest (which by definition, as noted above, include the union and its officers) and the carefully tailored exemptions to those transactions reinforce this requirement of a plan trustee's undivided loyalty; and especially in the case of a Taft-Hartley trust, are also designed to ensure, as the Court below stated, that "the interests of the Union and its officers" be separated "from those of the Plans, their participants and their beneficiaries" (App. 313).

It is because these defendants violated the provisions of the Consent Order which represented "an attempt to bring these operations in compliance with ERISA" (App. 313) and also violated the provisions of the statute itself that the Court found it necessary to fashion the remedy imposed.

III. THE COURT BELOW ACTED WITHIN ITS EQUITABLE POWERS AND WELL WITHIN ITS DISCRETION IN APPOINTING A RECEIVER FOR THE PENDENCY OF THE ACTION.

Upon its findings of fact and conclusions of law discussed above, the trial court determined that "[t]he best interests of the Plans' participants and beneficiaries require immediate appointment of a receiver for all three Plans and RPI pending final determination of this action" (App.311). Appellants, however, contend that the court was without statutory authority under ERISA to appoint a receiver for the plans and RPI; alternatively, they suggest that even if a receiver is a permissible interim remedy under the statute, the court abused its discre-

tion in appointing a receiver under the facts of this case. In making these contentions, appellants ignore the broad equitable powers expressly conferred on the court by ERISA and also seek to minimize the extensive pattern of "manipulation and diversion of plan assets similar to that alleged in the complaint" (App. 315) found by the Court as the basis for warranting this relief.

ERISA section 502(a)(5), 29 U.S.C. 1132(a)(5), provides that, barring certain exceptions not relevant here, a civil action may be brought by the Secretary of Labor

(A) to enjoin any act on practice which violates any provision of this title, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce provision of this title. (Emphasis added)

In addition, ERISA section 409(a), 29 U.S.C. 1109(a), provides that a fiduciary who breaches any of the fiduciary provisions of the Act shall be subject to personal liability and in addition,

shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary.

Thus the language of the statute provides that the Courts should draw upon traditional equitable remedies, of which receivership is one, 20/ in fashioning appropriate relief, and

20/ Appellants note that certain provisions of Title IV of ERISA make specific reference to the appointment of a receiver and suggest that the absence of such a reference in the remedies provisions of Title I support their position that those provisions should not be read to permit appointment of a receiver.
(cont. on next page)

further the statute expressly states that removal of trustee-fiduciaries would be proper in appropriate circumstances. These provisions set forth ample express statutory authority for a Court to temporarily remove or suspend fiduciaries and to appoint a receiver pending final determination of an action for permanent removal.

Given this express language and given the remedial purposes of ERISA, see discussion at 5-6 supra, there can be no doubt that this interim relief is available to the trial court. The Supreme Court, in a long line of decisions, has emphasized the breadth of the power of a court of equity to fashion appropriate remedies, particularly to enforce the purposes of Congress and when the public interest is at stake. Thus Justice Harlan cited the earlier case of Porter v. Warner Co., 328 U.S. 395 in finding the right to broad remedies in an action by the Secretary of Labor under the Fair Labor Standards Act:

'unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of its jurisdiction. And since the public interest is involved those equitable powers assume an

19/ (footnote con't.)

Title IV establishes the Pension Benefit Guaranty Corporation (PBGC), an agency created to provide termination insurance to certain categories of employee benefit plans. The provision of title IV to which appellants refer, 29 U.S.C. 1304, permits PBGC itself to appoint a receiver for a terminating plan with subsequent court approval. Here, of course, it is a court of equity, not an agency, which has appointed a receiver. The appointment of a receiver pendente lite in proper circumstance is an inherent power of a court of equity. See Clark Receivers §149.

even broader and more flexible character than when only a private controversy is at stake.... [t]he court may go beyond the matters immediately underlying its equitable jurisdiction.... and give whatever other relief may be necessary under the circumstances.'

Mitchell v. DeMario Jewelry, 361 U.S. 288, 291 (1959)

Following this reasoning, in a decision appointing a receiver in a Securities Act proceeding, a Court found "there is inherent in the courts of equity a jurisdiction to give effect to the policy of the legislature." Los Angeles Tr. D. & M. Exch. v. Securities and Exchange Commission, 285 F.2d 162 (9th Cir. 1960), cert. den. 366 U.S. 919. See also Securities and Exchange Commission v. Capital Counsellors, Inc., 332 F.Supp. 291, (S.D.N.Y. 1971) (Decision appointing receiver in Securities Act case as preliminary remedy to prevent diversion of assets).

Moreover, the legislative history of ERISA is entirely consistent with and reinforces this conclusion. The reports of the various committees reporting predecessor bills containing similar remedies provisions evidence the general intent of Congress: to make available the broadest possible equitable remedies to protect the interests of participants and beneficiaries.

The enforcement provisions have been designed specifically to provide both the Secretary and participants and beneficiaries with broad equitable remedies for redressing or preventing violations of the Act. The intent of the Committee is to provide a full range of legal and equitable remedies....
3 U.S. Code Congressional and Administrative News
4655 (93d Cong. 2d Sess. 1974).

The legislative history also makes clear that one of the purposes of ERISA is to federalize and apply the protections of trust law to employee benefit plans and to have the federal courts draw on principles of traditional trust law to fashion appropriate remedies.^{21/} In the Conference Report, Senator Williams, a chief sponsor of the bill, noted that with respect to the fiduciary provisions:

The objectives of these provisions are to make applicable the law of trusts; . . . to establish uniform fiduciary standards to prevent transactions which dissipate or endanger plan assets; and to provide effective remedies for breaches of trust.
3 U.S. Code Congressional and Administrative News
5186 (93d Cong. 2d Sess. 1974).

And it is well established in trust law, that a court may appoint a receiver for an ongoing trust during the pendency of an action, to protect the interests of the beneficiaries:

A receiver will be appointed by the court to take possession of the subject matter of the trust or a part thereof and to administer the trust in respect thereto, if this is necessary for the protection of the interest of the beneficiary

Restatement of the Law of Trusts -
Second §199(d)(1959).

^{21/} While Congress intended that the federal courts should draw upon traditional state law trust concepts in fashioning this common law, the case law that develops will be truly "federal." ERISA section 514, 29 U.S.C. 1144, provides generally that Titles I and IV of the statute supersede all state law, including state common law, relating to employee benefit plans.

See also Scott, The Law of Trusts III §199.4 (1967) and cases cited therein.

Accordingly, the language of the Act itself, the inherent powers of a court of equity, and the trust law precedents to which the Act's framers point, demonstrate that appointment of a receiver should be among the arsenal of remedies available to protect the interests of participants and beneficiaries. ^{22/}

Appellants also argue with respect to RPI that the Court does not have the power to appoint a receiver over it because 1) RPI is a separate and independent entity from the plans; and because 2) while RPI is a party-in-interest pursuant to ERISA §314(G), 29 U.S.C. 1002(G), there are no allegations of fraud or substantial dissipation against it. These contentions ignore the fact that the prohibitions of the consent order

^{22/} Appellants also contend that the remedy of receivership should not be permitted under ERISA because somehow that result would be inconsistent with the policies reflected in those provisions of the Norris-LaGuardia Act which limit issuance of injunctions in labor disputes, 29 U.S.C. 101 et seq. While it is difficult to perceive how these provisions bear in any way upon the issue before this Court, it is clear that the language of ERISA and its legislative history, as discussed in the text, express the Congressional policy decision to make the complete range of equitable remedies available to protect the interests of participants in employee benefit plans and their beneficiaries. See Findings Declaration of Policy, ERISA §2(b), 29 U.S.C. 1001(b). Employee benefit plans which result from collective bargaining are in no way exempted from the fiduciary requirements and the appropriate remedies for violations of them. See ERISA §§3(1)-(3) and (4), 29 U.S.C. 1002(1)-(3) and (4), and discussion at 25-26 supra.

applied to RPI as well as to the plans' trustees and other defendants, and that the evidence shows and the Court found that RPI was among the viol. rs. And, of course, it exhorts form over substance to suggest that the Court had no power to impose the receivership on RPI as well as the plans when RPI is wholly owned by the trustees of the welfare plan and obtains its only income from the welfare and pension plans.^{23/} Having used as their instrument the corporate form to do what they could have done directly, defendants cannot dodge equity's remedial powers by hiding behind the corporate veil. Bangor Punta Operations, Inc., v. Bangor & Aroostock Railroad Co., 417 U.S. 703, 713 (1974); Woodlawn Home Corp. v. Weinberger, 411 F. Supp. 501 (D.C.N.Y. 1976). The fiction of a corporate entity must be disregarded if it has been used to circumvent the provisions of a statute. Casanova Guns, Inc., v. Connally, 454 F.2d 1320 (7th Cir. 1972).

As the above discussion makes clear, the trial court without doubt had the power to appoint a receiver over the plans and RPI pendente lite; and we submit that the Court also acted well within its discretion in so doing. Indeed, "[t]he Court has the authority and the duty to enforce the remedy which is most advantageous to the participants and beneficiaries and most conducive to effectuating the purposes of the trust." Usery v. Penn, No. CIV-76-0427-T (Dec. 29, 1976 W.D. Okla.) (Order granting rescission, removal of fiduciaries and other

^{23/} In any event, a receiver for the welfare plan by implication has control over RPI as the sole holder of its stock.

equitable relief upon a finding of breaches of fiduciary duty under ERISA, reported at 119 BNA Pension Law Reporter D-1 (Jan. 10, 1977)). See also Louisiana et al. v. United States, 380 U.S. 145, 154 (1964).

The court below was faced with selecting an appropriate remedy to stop ongoing dissipation of plan assets to prevent "diversion or waste of assets to the detriment of those for whose benefit, in some measure this ... action is brought." Securities and Exch. Comm'n v. Capital Counsellors, Inc., 332 F. Supp. at 304. This dissipation was found by the Court below to be in violation of a previous consent order which had "represented an attempt to bring these operations in compliance with ERISA" (App. 313), and in violation of ERISA itself. The Court also found that the expenditures of the plans through RPI for administrative costs constituted 25 percent of the plans' annual income, which, based on the evidence, appeared to the court to be far beyond the cost of services required for the actual administration of these plans (App. 314). Thus the Court concluded the "this dissipation of plan assets must stop if the legitimate rights and expectations of the plans' participants and beneficiaries are to be protected" (App. 315). It determined, consistent with guiding equitable and trust law principles, see authority cited at pages 27-31 supra, that a receiver was necessary to protect those interests.

Appellants are quite correct in their suggestion that a receiver is a drastic remedy and should be imposed only when

there is grave and imminent danger of dissipation and that injury can be avoided in no other way.^{24/} In its careful and thoughtful opinion the Court realized that it was imposing a drastic remedy, but concluded that the best interests of the plans' participants and beneficiaries required "immediate and drastic action by the court in order to preserve from further dissipation the assets of the plans" (App. 313-14). The court had good and substantial reasons to require the imposition of an independent outsider in view of its findings that a previous less drastic order had been violated and that the conflicting interests and activities of the union and the plans (through RPI) had been so extensively intertwined that, given the situation, it was "apparently impossible to obtain compliance with the purposes of ERISA as long as the overlapping of duties, salaries and interests remained" (App. 313) in the form they had taken.

The authority appellants cite does not in any way call into question the propriety of the District Court's exercise of

^{24/} This rule is stated in Chambers v. Blicke Ford, et al., 313 F.2d 252 (2d Cir. 1963) cited by plaintiff. However, the reasoning of that case is not pertinent here, as the Court did not reach the issue of judicial discretion. There this Court affirmed the denial of an application by a receiver of a Connecticut corporation to obtain receivership over two New York corporations. The Court, construing Connecticut law, rested its decision on a finding that that law did not authorize appointment of a receiver for a foreign corporation, in the absence of that corporation holding property in Connecticut.

discretion here. Appellants first point to Leighton v.

One William Street Fund, Inc., 313 F.2d 252 (2d Cir. 1963).

Leighton was a derivative action by a stockholder seeking, upon preliminary motion, an interim receiver for the defendant fund.

The motion was based upon claims, not yet established, of conflicts of interest and waste of corporate assets by defendant directors of the fund. The Court, finding no irreparable injury, denied the motion. Here, by contrast, the District Court, after full evidentiary hearing, found violations of a previous order and of the law and injury arising from ongoing dissipation of plan assets. Nor is Wickes v. Belgian American Educational Foundation,

266 F. Supp. 38 (S.D.N.Y.) apposite. There the Court denied plaintiff's motion to appoint a receiver upon a finding that plaintiff had not demonstrated that irreparable injury was either immediate or likely. In both Mintzner v. Wright & Co. 263 F.2d 823, 826 (3d Cir. 1958), and Zinke-Smith, Inc. v. Marlowe, 323 F. Supp. 1151 (D.C.V.I. 1971) also cited by appellants, the courts declined to exercise their discretion to appoint a receiver.

Those cases, however, involved customers' (or creditors') claims against corporations in which preservation of the corporate assets was sought until an adjudication on the merits, and both courts declined to order the remedy in an absence of a showing of imminent danger of dissipation. Here, of course, the beneficial interests of the participants of the plans are at

stake, and the Court has found ongoing violations and a continuing pattern of dissipation to the clear detriment of those participants.

Appellants blind themselves to the thrust of the Court's findings by concentrating on the most technical violations of the consent order, arguing that the diversion of plan assets was minimal,^{25/} ignoring the finding of extensive intertwining of conflicting interests and avoiding confronting the Court's finding of an extensive "pattern of manipulation and diversion" to which they provide no satisfactory answer. But even when they so minimize the gravity of the violations of the previous order, they are only able feebly to argue that further limited injunctive relief would adequately protect the plans. ^{26/}

^{25/} Appellants blindness to the thrust of the Court's decision is most marked in their suggestion that the Court relied as the basis of its remedy on its finding that they had not complied fully with a request for production of documents. Although this noncompliance, the court found, also constituted a violation of the provisions of the consent order requiring production of books and records, it is abundantly clear from the Court's decision that it was the continuing diversion of plan assets that required the remedy imposed.

^{26/} Appellants also argue that an interim receiver is not appropriate because the Secretary of Labor does not ultimately seek a permanent receiver. Appellants ignore the fact that the Secretary is seeking permanent removal of these trustee-fiduciaries pursuant to ERISA §409 as well as other equitable relief; and consistent with the principles of trust law, an interim receiver may be appointed in an action to remove a trustee. See Restatement of the Law of Trusts -- Second §199(d) (1959). Thus, Gordon v. Washington, 295 U.S. 30 (1935), appellants' authority for the proposition that a receiver is not proper when it is not ancillary to some form of final relief, is without application. Equally without application are

Thus, we believe that the Court's findings, as well as its discussion of the reasons for the remedy it selected, abundantly demonstrate that the Court acted carefully, properly, and well within its discretion.

IV. THE COURT HAD THE POWER TO APPOINT A RECEIVER TO CARRY OUT THE DUTIES OF THE TRUSTEES PENDENTE LITE WITHOUT REQUIRING THAT EITHER THE PLAN PARTICIPANTS AND BENEFICIARIES OR THE PLANS THEMSELVES BE MADE PARTIES.

Appellants mistakenly suggest that a receiver may not be appointed in this case because neither the plans' participants and beneficiaries nor the plans themselves are joined as parties.

The suggestion that the Secretary of Labor must join plan participants and beneficiaries in every action he brings which might significantly affect a plan would result in defeating the statutory scheme designed to protect the interest of those very participants and beneficiaries. As noted at the outset, ERISA section 502, 29 U.S.C. 1132, sets forth a broad scheme of civil enforcement to effectuate the purposes of the statute.

27/ (footnote cont.)
Gordon v. Ominsky, 294 U.S. 186 (1935) and Pennsylvania v. Williams 294 U.S. 176 (1935) also cited by appellants. Those actions involved petitions for the appointment of a receiver to liquidate insolvent building and loan associations in circumstances where state statutes provided for a similar procedure to be effected by a state officer. The Supreme Court ruled that the district court, upon a petition by the state, should have, in the exercise of its discretion, relinquished its jurisdiction in favor of the state officer.

It provides in part, that a civil action may be brought

* * * *

by the Secretary [of Labor] or by a participant, beneficiary or fiduciary for appropriate relief under section 409 28/ [and]

* * * *

... by the Secretary (A) to enjoin any act or practice which violates any provision of this title, or (b) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this title.

It is evident from these provisions and from the purposes of the statute, see 29 U.S.C.1001(2), that Congress intended that the Secretary of Labor be able to act alone as plaintiff in the interests of the plan participants and beneficiaries ^{29/} in seeking relief under the statute. The participants and beneficiaries of the

28/ Section 409, 29 U.S.C. 1109, quoted in part at p. 27 supra, provides, among other things, for removal of fiduciaries in appropriate circumstances.

29/ In Green v. Brophy, 110 F.2d 536 (D.C.Cir. 1940) which plaintiffs cited, in support of their contention, the Court noted that beneficiaries of a trust need not be joined if their interests are adequately represented by their trustee in the litigation; in Green, however, the Court found that neither the plaintiff or defendant (each of whom represented competing national unions) were qualified to represent the beneficiaries -- the beneficiaries being two competing factions of the membership of a local union. Bogert, which the court quote for the proposition that the beneficiaries are parties in some capacity in an action for removal of a trustee, also notes that "where some beneficiaries sue for the appointment of a receiver of the trust, to have the trustees removed, and for the appointment of successor trustees, the other beneficiaries are not indispensable parties, and if they were, would be represented by the plaintiffs, where there is no conflict of interest between cestuis," citing Bowles v. Superior Court, 283 P.2d 704, 44 Cal. 2d 574. See Bogert, Trusts and Trustees, 522 at footnote 11 (1960).

plan in this case number up to 10,000, and there are many employee benefit plans whose participants number in the hundreds of thousands. To permit the Secretary of Labor to bring remedial actions as sole plaintiff for the benefit of those persons the Act is designed to protect is true to the express language of the statute; to impose some other requirement is unnecessary and could have devastating practical consequences inconsistent with the purposes of the statutory scheme.

Like the participants and beneficiaries of the plans, the plans themselves will be affected by, but are not necessary to, this litigation. This action is brought against present and former trustees of the plans^{30/} because the Secretary has claims to state against, and seeks relief from, those trustees.^{31/} No relief is sought against the plans. As trust law authority^{32/} demonstrates, a proceeding of this kind is properly in personam:

^{30/} The union and RPI are also defendants because the Secretary seeks relief against these parties in interest, who, it is alleged, received misappropriated plan assets.

^{31/} Certain appellants also argue that appointment of a receiver was improper because the defendants were not sued "in their capacity as trustees." As the Complaint recites (App. 5-6), the defendants were alleged to be present and former trustees. The relief sought against them personally includes restitution and their removal from trustee title and office).

^{32/} Prior to the passage of ERISA, an employee benefit trust could not be sued as an entity, see Dersch v. United Mine Workers Welfare and Retirement Fund, 309 F. Supp. (S.D. Ind. 1969); therefore such an action was necessarily, as well as properly, brought against the plan trustees.

[I]t may be a proceeding in personam to subject the trustee to personal liability, or to enjoin him from committing a breach of trust, or to compel him to make specific reparation for a breach of trust or to remove him

Restatement of the Law of Trusts - Second
§199 Comment at (f)(1959).

Joinder of the plans, which function only through their trustees (or receiver) would add nothing to this litigation. And to construe the ERISA provision which permits a plan to participate in litigation, ERISA §502(d)(1), 29 U.S.C. 1132(d)(1), so as to require that a plan be joined in every action against its trustees would impose an unnecessary procedural hurdle, not contemplated by or warranted in the statutory scheme of remedies.

V. CONCLUSION

For the reasons stated above, the District Court acted properly in appointing a receiver, and accordingly, that Court's orders should be affirmed. For the reasons stated herein, neither can appellants show the presence of grounds for a stay, Eastern-Airlines v. Civil Aeronautics Board, 261 F.2d 830 (2d Cir. 1958); Belcher v. Birmingham Trust National Bank, 395 F.2d 685 (5th Cir. 1968), and accordingly their motions, consolidated with the appeal itself, should be denied.

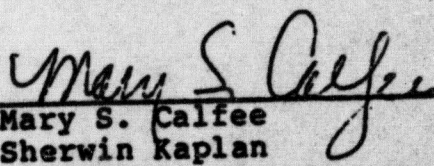
Respectfully submitted,

Francis V. LaRuffa
Regional Solicitor

Carin Ann Clauss
Solicitor of Labor

Steven J. Sacher
Associate Solicitor
Plan Benefits Security Division

Monica Gallagher
Counsel for Litigation


Mary S. Calfee
Sherwin Kaplan
Attorneys
Plan Benefits Security Division
Room C-4508
U.S. Department of Labor
Washington, D.C. 20210
(202) 523-9595

Certificate of Service

I hereby certify that on this 5th day of July, 1977,
two copies of the foregoing Brief for the Secretary of
Labor were served on the following Counsel for Appellants
at the addresses below.

Mary S. Calfee

Mary S. Calfee

Attorney

Plan Benefits Security Division

Mark L. Amsterdam, Esq.
Rubin, Hanley & Amsterdam
299 Broadway
New York, New York 10007
(Hand-delivered)

Charles F. Murphy, Esq.
Murphy & Maviglia
250 West 57th Street
New York, New York 10019
(Hand-delivered)

Herbert A. Simon, Esq.
99 West Hawthorne Avenue
Valley Stream, New York 11508
(Mailed postage-prepaid)

Michael Lesch, Esq.
Arthur F. Felsenfeld, Esq.
Shea, Gould, Climenko &
Casey
330 Madison Avenue
New York, New York 10019
(Hand-delivered)

